

2000

The Kosovo Crisis: Implications of the Right to Return

Eric Rosand

Recommended Citation

Eric Rosand, *The Kosovo Crisis: Implications of the Right to Return*, 18 BERKELEY J. INT'L LAW. 229 (2000).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol18/iss2/5>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The Kosovo Crisis: Implications of the Right to Return

By
Eric Rosand*

In the Washington Post of May 14th, Secretary of State Madeleine Albright and British Foreign Secretary Robin Cook wrote that the NATO campaign against Serbia was initiated in response to the ethnic cleansing in Kosovo because:

it was the right thing to do. We will not stop [they declared] . . . until we have created the conditions under which the ethnic cleansing of Kosovo can be reversed We are fighting to get the refugees home, safe under our protection. Their homes have been destroyed, villages burnt, their lives ruined by a regime determined to achieve ethnic purity and prepared to use cruel and violent means to achieve it.¹

Two days earlier, President Clinton defended the military intervention to a group of veterans, stating that the central imperative of the NATO air campaign was that “the Kosovars must be able to return home and live in safety.”²

In fact, throughout the 78-day NATO conflict, and in the days following its cessation, Western leaders cited as one of the main reasons for NATO involvement the return of the hundreds of thousands of Kosovar Albanians who had been driven from their homes and expelled from their homelands by the Serbian military and paramilitary forces. The bombing was to ensure, among other things, that the dislocated could return home and that any initially successful attempts at “ethnic cleansing” would be reversed. In short, an agreement to allow the safe and free return of Kosovar Albanian refugees and displaced persons was one of the prerequisites for a halt to NATO bombing.³

* Eric Rosand is an Attorney-Adviser in the U.S. Department of State's Office of the Legal Adviser. The views and opinions expressed are those of the author and do not necessarily represent those of the Department of State.

1. Madeleine Albright and Robin Cook, *Our Campaign is Working*, WASH. POST, May 16, 1999, at B7.

2. President Clinton's remarks in defense of military intervention in the Balkans, N.Y. TIMES, May 14, 1999, at A12.

3. On May 6, 1999, the G-8 Foreign Ministers adopted a number of general principles on the political solution to the Kosovo crisis. These included the establishment of a “safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees” and the “[s]afe and free return of all refugees and displaced persons” to their homes. Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersburg Centre on May 6, 1999, reprinted in U.N. SCOR, 54th Year, Res. 1244, U.N. Doc. S/Res/1244 (1999), Annex 1. On June 3, 1999, Slobodan Milosevic, President of the Federal Republic of Yugoslavia, accepted this proposal to end the conflict. See, e.g., Steven Erlanger, *Milosevic Yields on NATO's Key Terms; 50,000 Allied Troops to Police Kosovo*, N.Y. TIMES, June 4, 1999, at A1.

During the conflict, however, many were skeptical regarding the feasibility of NATO's aim.⁴ Speaking shortly after the bombing had commenced, the United Nations High Commissioner for Refugees, Sadako Ogata, stated that it was "difficult to even think of the future when the refugees and internally displaced persons will—as they firmly wish—return to their homes."⁵

The majority of the significant displacements of the 20th century have never been reversed. As a result of the Second World War, as many as ten million people were dislocated and while most were eventually absorbed by other countries. Hundreds of thousands of Palestinians and Cypriots still remain dislocated decades after their initial displacement. In addition, the recent conflicts in Croatia and Bosnia, which resulted in the dislocation of more than two million people, and were characterized by "ethnic cleansing" campaigns similar to the one carried out by Serbian forces in Kosovo, have taught us that "there may be no such thing as fast, voluntary return in the wake of war and ethnic cleansing."⁶ Much to the surprise of the international community, less than two months after the fighting stopped in early June, 1999, the vast majority of Kosovar Albanian refugees and displaced persons had in fact returned to their pre-conflict homes.⁷

Although NATO intervention paved the way for this mass return, the return of the survivors of the "ethnic cleansing" was explicitly supported by Security Council resolutions providing that those expelled from and displaced within Kosovo had the *right* to return under international law.⁸ The Security Council, in dealing with situations following mass displacement caused by successful ethnic cleansing campaigns, *e.g.*, Georgia/Abkhazia, Croatia, and Bosnia, had consistently reaffirmed the right of large groups of refugees and displaced persons to

4. See, *e.g.*, Judith Miller, *The Test: Getting the Refugees Home*, N.Y. TIMES, April 25, 1999, Sec. 4, at 1 and Jules Crittenden, *Kosovo Crisis: Sad Return Awaits Refugees—Homecoming a Logistical Nightmare*, BOSTON HERALD, April 11, 1999 at 7 (quoting Professor Hurst Hannum, "I am skeptical that it will be feasible to return even a portion of these people to their homes, because of the cost as well as the political implications").

5. Statement by Sadako Ogata to the Humanitarian Issues Working Group of the Peace Implementation Council, Geneva, April 6, 1999.

6. International Crisis Group, *The Balkan Refugee Crisis: Regional and Long-Term Perspectives*, at 2 (June 1, 1999) <<http://www.intl-crisis-group/projects/sbalkans/reports/ba02rep.htm>>.

7. UNCHR estimates that by July 28, 1999, some 737,000 Kosovar Albanians returned to Kosovo. UNCHR: News, *Kosovo Crisis Update*, (July, 28, 1999) <<http://www.unchr.ch/news/media/kosovo.htm>>. As of December 1999, nearly all Kosovar Albanians who wished to return had been able to do so. U.S. Dep't of State, *Ethnic Cleansing in Kosovo: An Accounting*, Overview, at 2 (Dec. 1999) <<http://www.usia.gov/regional/eur/balkans/kosovo/hrreport/1299>>. [hereinafter *Ethnic Cleansing in Kosovo*].

8. See, *e.g.*, S.C. Res. 1239, U.N. SCOR, 54th Year, U.N. Doc. S/RES/1239 (1999), at ¶ 4 ("reaffirms the right of all refugees and displaced persons to return to their homes in safety and dignity"); S.C. Res. 1203, U.N. SCOR, 53rd Year, U.N. Doc. S/RES/1203 (1998) at ¶ 12 ("reaffirms the right of all refugees and displaced persons to return to their homes in safety and underlines the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so"); S.C. Res. 1199, U.N. SCOR, 53rd Year, preamb., U.N. Doc. S/RES/1199 (1998) ("reaffirms the right of all refugees and displaced persons to return to their homes in safety and underlining the responsibility of the Federal Republic of Yugoslavia for creating the conditions which allow them to do so").

return.⁹ As already noted, however, the vast majority have not been able to do so. The inability to reverse significantly the “ethnic cleansing” campaigns has proven a stumbling block in the international community’s efforts to bring long-term stability to these regions. Thus, at the end of a decade that has seen a precipitous rise in the number of ethnically motivated internal conflicts, a corresponding dramatic rise in the number of refugees and displaced persons, and a repeated call for the millions of dislocated to exercise their right to return, it is quite significant that the international community, acting through NATO, was not only prepared to, but did use force to secure this right.

Nevertheless, the return of the Kosovar Albanians should not be seen only as part of a successful resolution of a political problem, brought about through unprecedented military intervention. Rather, it has significant legal implications as well: namely, it provides additional support for the developing principle that those dislocated during “ethnic cleansing” campaigns have the right to return to their home of origin under international law. It is in this context that I examine the Kosovo conflict. I will first briefly describe the “ethnic cleansing” campaign in Kosovo and how, in the aftermath of such situations, the right to return has come to be viewed as the appropriate remedy. After providing a general overview of this right under existing international human rights instruments, I will touch upon two important questions: whether the right to return can and should be universally applied to situations of mass displacement and whether the impact of the Kosovo situation on the development of this right is in any way diminished by the fact that the mass and speedy reversal of “ethnic cleansing” largely was the result of political and military intervention.

The “ethnic cleansing” campaign that Serbian and Yugoslav military and paramilitary forces waged against the Kosovar Albanian majority population between March 1998 and June 1999 has been well-documented. Over 1.5 million Kosovar Albanians, at least 90% of the estimated 1998 Albanian population in Kosovo, were forcibly expelled from their homes.¹⁰ Many were herded onto trains and other organized transport and driven from the province. Serbian authorities often forced many of these soon-to-be refugees to sign disclaimers which stated they were departing Kosovo voluntarily.¹¹ Victims have described

9. See, e.g., Bosnia: S.C. Res. 1088, U.N. SCOR, 51st Sess., at ¶ 11, U.N. Doc. S/RES/1088 (1996); S.C. Res. 1034, U.N. SCOR, 50th Sess., at ¶ 18, U.N. Doc. S/RES/1034 (1995) (reaffirming right of those dislocated during war in Bosnia to return to their homes of origin); Croatia: S.C. Res. 1145, U.N. SCOR, 52nd Sess., at ¶ 7, U.N. Doc. S/RES/1145 (1997) (reaffirming the right of all refugees and displaced persons originating from the Republic of Croatia to return to their homes of origin); Georgia/Abkhazia: S.C. Res. 1225, U.N. SCOR, 54th Sess., at ¶ 7, U.N. Doc. S/RES/1225 (1999); S.C. Res. 1187, U.N. SCOR, 53rd Sess., at ¶ 3, U.N. Doc. S/RES/1187 (1998) (reaffirming right of all refugees and displaced persons created by the conflict in Abkhazia to return their homes in secure conditions in accordance with international law).

Since the end of the NATO air campaign, the Security Council, in addressing the situation in East Timor, has reaffirmed the right of refugees and displaced persons to return home. S.C. Res. 1264, U.N. SCOR, 54th Sess., at preamb., U.N. Doc. S/RES/1264 (1999).

10. *Ethnic Cleansing in Kosovo*, supra note 7, Summary at 2.

11. U.S. Dep’t of State, *Erasing History: Ethnic Cleansing in Kosovo, Documenting the Abuses*, at 1, (May, 1999) <<http://www.usia.gov/regional/eur/balkans/kosovo/hrreport/599/over.htm>> [hereinafter *Erasing History*].

how Serbian forces confiscated personal belongings and documentation, including national identity cards, in the belief that without such identification return could be legally prevented.¹² The Serbs mockingly reminded the soon-to-be refugees to take a final look at the homeland they were leaving, supposedly forever. As a recent State Department report has documented, many of the places the Serbs targeted in Kosovo had not been scenes of previous fighting or KLA activity. This, the report concluded, indicates that the expulsions were not part of a legitimate security or counter-insurgency operation.¹³ Rather, they were purely an exercise in "ethnic cleansing," part of an organized plan to rid the province of the vast majority of the ethnic-Albanian population.¹⁴

Although it has not always been the case, the method and objective of the Serbian offensive, namely, mass expulsion and the forcible transfer of the civilian population, are now clearly contrary to international human rights and humanitarian law.¹⁵ The Universal Declaration of Human Rights ("Universal Declaration")¹⁶ contains a number of fundamental principles relevant to mass expulsion that have become enshrined in customary international law. For example, Article 3 states that "Everyone has the right to life, liberty and security of person"; Article 5 provides that "No one shall be subjected to arbitrary . . . exile"; Article 9 reads, "No one shall be subjected to arbitrary interference with his privacy, family [or] home"; and Article 12 states that "No one shall be arbitrarily deprived of his nationality." All of these principles are set forth in widely ratified universal and regional human rights instruments,¹⁷ and all are violated when a state expels or forcibly deports/transfers its citizens or residents. The United Nations Subcommittee on the Prevention of Discrimination and Protection of Minorities has stated that "practices of forcible exile, mass expulsions

12. *Id.* at 5.

13. *Id.* at 1.

14. *Id.*

15. See, e.g., the U.N. Subcommittee on the Prevention of Discrimination and the Protection of Minorities [the Subcommittee], the U.N. Commission on Human Rights [UNCHR], and the International Law Commission have all reached that this conclusion. Basing its work on customary law, the Subcommittee concluded that expulsion from ones homeland was unlawful. See E.S.C. Res. 1994/24 U.N. ESCOR 49th Sess., U.N. Doc. E/CN.4/Sub.2/1994.L.11/Add.3 (1994). The UNCHR concluded that expulsion constitutes a gross violation of human rights. See *Human Rights and Mass Exoduses*, Res. 1995/88, art. 3, U.N. ESCOR, 50th Sess. See also Report of the International Law Commission on the Work of the Forty-Third Session, U.N. GAOR, 46th Sess., Supp. No. 10 at 250, U.N. Doc/ A/46/10 (1992). See also Eric Rosand, *The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1117 (1998); John Quigley, *Displaced Palestinians and a Right of Return*, 39 HARV. J. INT'L L. 171, 221 (1998); J.M. HENCKAERTS, *MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE* (1995); RESTATEMENT (THIRD) OF THE LAW: FOREIGN RELATIONS OF THE UNITED STATES § 702 cmt. m (characterizing "mass uprooting of a country's population" as a human rights violation).

16. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR or *Universal Declaration*].

17. See, e.g., *International Covenant on Civil and Political Rights*, entered into force March 23, 1976, 999 U.N.T.S. 171, Arts. 6, 7, 9, 12, 17 [hereinafter ICCPR]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, entered into force Sept. 3, 1953, 1950, arts. 2, 3, 5, 8 [hereinafter *European Convention*]; Protocol No. 1 to the *European Convention*, entered into force May 18, 1954, art. 1; Protocol No. 4 to the *European Convention*, entered into force May 2, 1968, arts. 2-4.

and deportations, populations transfer, 'ethnic cleansing' and other forms of forcible displacement of populations within a country or across borders deprive the affected population of their right to freedom of movement" and are therefore contrary to international law.¹⁸

One could also view the "ethnic cleansing" campaign against the Kosovar Albanians as a violation of international humanitarian law under Article 49 of the Fourth Geneva Convention (the convention relating to the protection of civilians) which prohibits expulsion of a people by a belligerent occupant.¹⁹ Some commentators have asserted that, in addition to violating widely recognized provisions of international human rights and humanitarian law, the forcible expulsion of a people constitutes a crime under international law.²⁰ Cited in support of this proposition are the 1945 London Agreement establishing the Nuremberg Tribunal, the Allied Control Council Law No. 10, the Statutes of the International Criminal Tribunals for the Former Yugoslavia (Article 5) and Rwanda (Article 3), and the Rome Statute of the International Criminal Court.²¹

Given the unlawful nature of the forcible mass expulsion carried out by the Serbian military and paramilitary forces, and that an internationally wrongful act imposes on the wrongdoing state the obligation to make complete reparation,²²

18. U.N. Subcomm'n on Prevention of Discrim. and Protection of Minorities, Res. 1995/13, U.N. ESCOR, 50th Sess., at 20, U.N. Doc. E/CN.4/Sub.2/1995/L.11/Add.3 (1995).

19. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. This prohibition also appears in Additional Protocol II of 1977, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, art. 17, 1125 U.N.T.S. 609.

20. See, e.g., *Opinion: Legal Issues Arising from Certain Population Transfers and Displacements on the Territory of the Republic of Cyprus in the Period since 20 July 1974* (signatories: Georges Abi-Saab, Dieter Blumenwitz, James Crawford, John Dugard, Christopher Greenwood, Gerhard Hafner, Francisco Orrego Vicuna, Alain Pellet, Henry G. Schermers, Christian Tomuschat), at 4, (June 30, 1999) <<http://www.attorney-general.gov.cy/english.htm>>. [hereinafter *Opinion*]; Alfred de Zayas, *The Right to Return to One's Homeland and Ethnic Cleansing*, 6 CRIM. L. FOR. 257, 289 (1995). The International Military Tribunal at Nuremberg prosecuted the deportation of the native population and the implantation of settlers in occupied areas as both a war crime and a crime against humanity. 22 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOVEMBER 1945-1 OCTOBER 411 (1946).

21. For example, Article 7(1)(d) of the Rome Statute declares that "[d]eportation or forcible transfer of population" constitutes a crime against humanity "when committed as part of a widespread or systematic attack, directed against any civilian population."

22. Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (Ser. A) No. 17, 1928, reprinted in ANN. DIG. PUB. INT'L L. CASES 258, 260 (1929). See also, *Draft Articles on State Responsibility, Pt. 1, art 43, adopted on first reading by the International Law Commission*, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 30-35;COVERY T. OLIVER, *Legal Remedies and Sanctions, in INJURIES TO ALIENS*, 71 (Richard Lillich ed., 1983).

Under traditional principles of State responsibility, a wrongdoing state was responsible for its conduct to the injured State, rather than to the injured individual(s). Some have argued, however, that this notion of State responsibility has been broadened in recent years to place obligations on the wrongdoing state toward the injured individual(s) and provide the injured individuals with corresponding rights against the wrongdoing state. See STATE RESPONSIBILITY AND THE INDIVIDUAL (Albrecht Randelzhofer & Christian Tomuschat eds. 1999) (discussing this trend); *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* ¶ 41, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 3, 1993) (final report submitted by Theo van Boven, Special Rapporteur, Commission on Human Rights); IAN BROWNLEE, PRINCIPLES OF INTERNATIONAL LAW 512-13 (1990).

what then is the appropriate remedy under international law for such wrongdoing? *Restitutio in integrum* appears to be the preferred and most far reaching remedy in such situations. This demands, most importantly, the return of all those dislocated to their homes, which would go a long way toward restoring the pre-expulsion demographics.²³

The Security Council has emphasized the right to return as being the appropriate remedy in situations following violations of international law resulting from "ethnic cleansing." In the context of the Balkan conflicts between 1991-1995, the Security Council repeatedly reaffirmed the right of the over two million refugees and displaced persons dislocated during these conflicts to return home.²⁴ The Security Council similarly endorsed the return of large numbers of refugees and displaced persons in the aftermath of mass expulsions in Rwanda, Georgia/Abkhazia, and Tajikistan.²⁵

Return is not simply the appropriate legal remedy. It has practical significance as well. The ability of the dislocated to return to their pre-conflict homes promises the survivors of "ethnic cleansing" a measure of justice that will contribute significantly to restoring stability to the conflict region. The failure to recognize and secure the right of return of the Kosovar Albanians would have simply exacerbated an already volatile situation. Scattered throughout Europe, these hundreds of thousands of refugees would have been an easily mobilized force that likely would have sought through military means to seize control of their homeland province of Kosovo. In May 1996, President Clinton noted that peace following brutal internal conflicts will not endure for long without justice, "for only justice can break the cycle of violence and retribution that fuels crimes against humanity."²⁶ The prosecution of war criminals, he added, is an essential element of this process, as it sends a strong signal to those who committed the terrible atrocities that underlie "ethnic cleansing" campaigns—namely—they cannot escape the consequences of their actions.²⁷ The prosecution of the perpetrators, although certainly important, is not enough to ensure justice, as it fails to provide any redress to individual victims. Guaranteeing individual survivors the right to return, however, will provide each refugee or displaced person with at least some measure of justice for wrongs suffered.

23. See, e.g., Commission on Human Rights, Subcom'n on Prevention of Discrim. and Protection of Min., 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Freedom of Movement: Human Rights and Population Transfer, Final Report of Special Rapporteur Mr. Al-Khasawneh, at para. 60.

Restitutio in integrum may also require that the wrongdoing State provide just compensation to the survivors of "ethnic cleansing." This issue, however, is beyond the scope of this paper.

24. See e.g., S.C. Res. 1034, U.N. SCOR 50th Sess., at ¶ 18, U.N. Doc. S/RES/1034 (1995); S.C. Res. 1019, U.N. SCOR 50th Sess., at ¶ 6-7, U.N. Doc. S/RES/1019 (1995); S.C. Res. 941, U.N. SCOR 49th Sess., at ¶ 3, U.N. Doc. S/RES/941 (1994); S.C. Res. 820, U.N. SCOR 48th Sess., pream. & ¶ 7, U.N. Doc. S/RES/820 (1993).

25. See e.g., S.C. Res. 1097, U.N. SCOR, 51st Sess., at ¶ 8, U.N. Doc. S/RES/1097 (1997) (Georgia/Abkhazia); S.C. Res. 1078, U.N. SCOR, 51st Sess., preamb., U.N. Doc. S/RES/1078 (1996) (Rwanda); S.C. Res. 999, U.N. SCOR, 50th Sess., ¶¶ 8, 14, U.N. Doc. S/RES/999 (1995) (Tajikistan).

26. President Bill Clinton, Commencement Address at Connecticut College (May 1996).

27. *Id.*

From the start of the Serbian offensive in Kosovo, the right of those being dislocated to return did indeed assume a prominent role in the statements and resolutions of U.N. bodies and other international leaders. In a series of resolutions between September 1998 and June 1999, the Security Council reaffirmed the right of all refugees and displaced persons, dislocated as a result of the Serbian offensive in Kosovo, to return to their homes in safety.²⁸ In addition, Mary Robinson, the United Nations High Commissioner for Human Rights, stated at the opening of the final meeting of the 55th Commission on Human Rights, “[the] right of refugees and displaced persons [from Kosovo] to return . . . must be vindicated if we are to be true to the principle of human rights protection.”²⁹ Thus, the international community made it quite clear that survivors of the “ethnic cleansing” campaigns had the right to return, regardless of NATO intervention.

First articulated in 1948 in Article 13(2) of the Universal Declaration of Human Rights, the right of return was tied to freedom of movement, providing that “Everyone has the right to leave any country, including his own, and to return to his country.” The 1966 International Covenant on Civil and Political Rights codified this right and it now appears in nearly all international human rights instruments, although its formulation differs. This right is now widely viewed as a general principle of human rights law³⁰ and as a recognized norm of customary international law as well.³¹ In fact, as I have already noted, the Security Council, in insisting upon the return of refugees following mass displacement in Abkhazia, Croatia, and Bosnia, has referred to an international obligation to allow for the return.³²

In a resolution of May 14, 1999, in the midst of the Kosovo crisis, the Council reaffirmed the right of the refugees and displaced persons to return to their homes, noting in the preamble that their return should be guided by, among other things, the Universal Declaration and other pertinent international human rights covenants and conventions.³³ Some even assert that this right may rise to the level of a peremptory norm, that is *jus cogens*, from which states cannot derogate.³⁴ There is broad agreement, then, that this right should be regarded as a general principle of international human rights law, thus forming part of customary international law.

28. See *supra* note 2.

29. Statement by Mary Robinson, United Nations High Commissioner for Human Rights, to the *Final Meeting of the 55th Commission on Human Rights* (April 30, 1999) <<http://unhchr.ch.>>.

30. See, e.g., John Quigley, *Mass Displacement and the Individual Right of Return*, XXXIV BRIT. Y.B. INT'L. L. 65, 70 (1998) [hereinafter, Quigley, *Mass Displacement*]; LEX TAKKENBERG, *THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW* 234 (1998); 23 LOUIS B. SOHN & THOMAS BUERGENTHAL, *THE MOVEMENT OF PERSONS ACROSS BORDERS* 7 (1992); Bill Frelick, *The Right of Return*, 2 INT'L. J. REFUGEE L. 442, 444 (1990).

31. See, e.g., Kathleen Lawand, *The Right to Return of Palestinians under International Law*, 8 INT'L J. REFUGEE L. 532, 544 (1996); John Quigley, *Family Reunion and the Right to Return to Occupied Territory*, 6 GEO. IMMIG. L.J. 223, 234 (1992).

32. See, *supra* note 8 and 25.

33. S.C. Res. 1239, U.N. SCOR, 54th Sess., at preamb. & ¶ 4, U.N. Doc. S/RES/1239 (1999).

34. See, e.g., *Opinion, supra* note 20, at 5; Quigley, *Mass Displacement, supra* note 30, at 122.

There is disagreement, however, concerning the scope of the right and whether it should in fact be applied to situations such as Kosovo. Many commentators argue that the right to return as formulated in Article 13(2) of the Universal Declaration and codified in Article 12(4) of the International Covenant does not apply to situations involving mass displacements.³⁵ On this view, if Security Council resolutions had not explicitly provided for this right in the context of the mass dislocation within and from Kosovo (with such resolutions being binding on Member States of the United Nations) there is some question whether the dislocated would in fact have had the *right* to return. In the context of Kosovo, this question is more than simply a theoretical one.

According to the Office of the United Nations High Commissioner for Refugees, an estimated 230,000 Serbs and other non-Albanians, including some 40,000 Gypsies, have fled Kosovo since NATO troops entered the province in June 1999.³⁶ Serb officials charge that the fear of reprisal attacks by returning Kosovar Albanians and the failure of NATO troops to protect adequately the Serbs from such attacks are largely responsible for this flight.³⁷ The Security Council and other international organizations have so far largely remained silent concerning the rights of these dislocated people to return home. Such silence, which is often the result of political disagreements among the permanent members of the Security Council, should not, however, determine whether a particular mass dislocated group, in fact, has the right to return.

The dislocated's right should not depend on Security Council action. Rather, it ought to be viewed as a legal principle that can and should be applied to all situations of dislocation. Thus, the Serbs who have fled or been driven from Kosovo must have the same right to return that the Security Council has supported in the context of the Kosovar Albanians.

Those who assert that the international law of the freedom of movement, of which the right to return is an important part, was not intended to address claims of large groups of refugees and displaced persons would disagree. They would argue that absent Security Council resolutions (which are binding on Member States) stating otherwise, the right to return is not applicable to the mass dislocated. Some 25 years ago, Lord Denning, ruling in a case in which thousands of British nationals who had been expelled from Uganda sought admission to Brit-

35. See, e.g., Eyal Benevisti and Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L. L. 294, 325 (1995); Donna E. Arzt, *Palestinian Refugees: The Human Dimension of the Middle East Peace Process*, 1995 PROC. AM. SOC. INT'L L. 372; HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 7-16 (1987); Ruth Lapidoth, *The Right to Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. HUM. RTS. 103 (1987); Stig Jagerskiold, *The Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS 166, 180 (1980) (Louis Henkin ed. 1981); Kurt Rene Radley, *The Palestinian Refugees: The Right to Return in International Law* 72 AM. J. INT'L L. 586 (1978).

36. Edward Cody, *Without a Home and Hope, Displaced Serbs Await Uncertain Fate*, INT'L HERALD TRIB., Feb. 18, 2000, at 7.

37. For a discussion of Kosovar Albanian reprisals, see, e.g., Timothy Garton Ash, *Anarchy and Madness*, N.Y. REVIEW OF BOOKS, February 10, 2000 (noting that "[i]t is entirely fitting to speak in this context of reverse ethnic cleansing Yet this ethnic cleansing has been carried out under the very noses and tank barrels of more than 40,000 international troop.").

ain, found them to have no rights under international law. He stated that "mass expulsions have never hitherto come within the cognizance of international law."³⁸ The argument set forth is that in situations of mass displacement there is insufficient State practice to support the application of the right to return. Indeed, those situations where large-scale returns have occurred have resulted from political solutions in which the international community was actively involved.

Many of those who would limit application of the right to return to individual cases believe that the more appropriate right in cases following mass expulsion, population transfer or "ethnic cleansing" is that of self-determination,³⁹ namely the right of a group of people "to determine, without external interference, their political status and to pursue their economic, social and cultural development."⁴⁰ But these rights are not mutually exclusive. Rather, the right to return should be understood as an individual right that applies regardless of one's group affiliation and the right to self-determination as a collective right. There is no reason not to consider both of these rights as applicable to the Kosovo situation.

To determine whether Article 13(2) of the Universal Declaration can indeed be used to support the return of mass displaced groups requires an analysis of the provision and its drafting history. At the time of drafting, the right of return was not recognized as a universally accepted principle of international law.⁴¹ The main treatises published prior to or shortly after 1948 do not even consider the existence of such a right.⁴² The issue of whether Article 13(2) applies to mass groups was not discussed during the drafting, nor does the text itself explicitly exclude mass displaced groups from its scope.⁴³ At that time, the right to return was viewed as merely an afterthought to the then more important "right to leave."⁴⁴ The drafting took place in the aftermath of World War II, when millions of displaced persons sought admission to countries where they might resettle. Soviet-bloc states maintained strict restrictions on movement, generally forbidding its citizens from leaving. Thus, the focus of the drafters was on guaranteeing the right to leave. This continued throughout the Cold

38. *R v. Secretary of State for the Home Department, ex parte Thakrar*, [1974] 1 QB 684, 702.

39. See, e.g., Mubanga-Chipoya, C.L.C., *Analysis of the Current Trends and Development Concerning the Right to Leave Any Country Including One's Own, and to Return to One's Country, and Some Other Rights or Considerations Arising Therefrom*, Subcomm'n on Prevention and Discrim. Minorities., U.N. Doc. E/CN.4/Sub.2/1988/35 at 27 (1988); HANNUM, *supra* note 33 at 169 n. 175.

40. *The Declaration of Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations*, U.N. G.A. Res. 2625 (XXV), Oct. 24, 1970. A discussion of the right to self-determination is beyond the scope of this paper.

41. Stig Jagerskiold, *Historical Aspects of the Right to Leave and to Return*, in *THE RIGHT TO LEAVE AND TO RETURN: PAPERS AND RECOMMENDATIONS OF THE INTERNATIONAL COLLOQUIUM*, Uppsala, Sweden, 19-21 June 1972 (Karel Vasak & Sidney Liskofsky eds.) at 10.

42. *Id.*

43. Quigley, *supra* note 30, at 76; U.N. GAOR, 10th Sess., Annexes (Agenda item 28-II), at 39, U.N. Doc. A/2929 (1955) (indicating discussion of the right of permanent residents and nationals to return, without mention of right of dislocated groups to do so).

44. Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1130 (1998).

War, as the West often used the language of human rights in ideological battles against the Soviet Union and its satellites, encouraging dissidents to exercise their “right to leave” their country.⁴⁵ In this context, the right to return received little attention.

The drafters were responding to the crisis of an immediate situation. They could hardly have anticipated that internal conflicts and the consequent massive dislocation would be a transcendent problem some fifty years later. At a time when the international community was giving its tacit approval to the expulsion of some six million ethnic Germans from the Sudetenland, the drafters could not have conceived that, half a century later, the international community would strongly favor the opposite solution: namely, restoration of multi-ethnic societies, and a refusal to accept the results of successful “ethnic cleansing” campaigns.⁴⁶

Thus, the “right to leave,” which, at the time of drafting, had been the cornerstone of the right to freedom of movement encapsulated in Article 13, has little relevance in a post-Cold War world in which forced international migration, including refugee flight, has reached disturbing proportions.⁴⁷ If one accepts the argument of those who assert that the right to return is intended to apply only to cases where small numbers of individuals are seeking to re-enter their countries, and not to mass displacement, then Article 13 of the Universal Declaration would have little relevance for the 21st century. In an era characterized by a precipitous increase in the number of internal conflicts marked by brutal “ethnic cleansing” campaigns that result in mass expulsions, and by the international community’s desire to maintain or reconstitute multi-ethnic societies, the “right to return” must be made applicable to all situations of displacement. Nothing in either the text of the Universal Declaration—or any other international human rights instrument, for that matter—or the *travaux préparatoires* forecloses such an interpretation.

Even if one were to accept the notion that this right, first formulated in the Universal Declaration and later codified in the International Covenant, was not intended to apply to situations of mass displacement caused by internal wars, its application by the Security Council and other international bodies in these situations indicates that the right is, in fact, being interpreted to apply to them. Although these bodies have stated that the mass displaced have the right to return, some caution may be called for before asserting that this broadened right to return has risen to the level customary international law.⁴⁸

45. See, e.g., HUMAN RIGHTS THE ESSENTIAL PREFERENCE 91 (Hilary Poole, ed. 1998). See also Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled “Iron Curtain”*, 65 TULANE L. REV. 849 (1991).

46. For a discussion of these events, see, e.g., ALFRED DE ZAYAS, A TERRIBLE REVENGE: THE ETHNIC CLEANSING OF THE EAST EUROPEAN GERMANS, 1944-1950 (St. Martin’s Press, 1994).

47. Arthur Hellon, *Essay: The Role of International Law in the Twenty-First Century: Forced International Migration: A Need for New Approaches by the International Community*, 18 FORDHAM INT’L L. J. 1623 (1995).

48. Customary international law is evidenced by a “general practice accepted as law” (Article 38 of Statute of the International Court of Justice) or a “general recognition among States of a certain practice as obligatory.” IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 5 (5th ed. 1998);

First, all too often, return is effectively blocked. There are a number of long-standing situations of mass displacement where, despite the repeated statements by various organs of the international community reaffirming the right to return, the dislocated have been unable to exercise it. Two such examples are Israel and Cyprus, where decades after their initial dislocation, thousands of refugees and displaced persons have been unable return. As a result, few examples of State practice exist to support this right in situations of mass dislocation.

Second, where large-scale returns have occurred, it has often been as part of a comprehensive political resolution, rather than out of a sense of recognition of a group's right to do so.⁴⁹ For example, despite the fact that the Security Council has unmistakably indicated that all of those dislocated following "ethnic cleansing" campaigns have the right to return, some would argue that the Serbs acquiesced to the return of the Kosovar Albanians only as a result of the NATO bombing campaign, rather than in recognition of the existence of their right to do so. Thus, they would insist that the Kosovo situation can not be cited to support the right of mass groups to return following mass displacement. Based on this view, the return of the more than one million refugees and displaced persons to Kosovo should be viewed solely as a political and military success, without consequence for international law. Perhaps it is for this reason that the legal commentary on the Kosovo crisis has not addressed the right to return.

It is true that regardless of how many Security Council resolutions and other statements by the international community in support of the return of the survivors of "ethnic cleansing" campaigns or other gross human rights violations to the homes from which they have been driven, the actual returns, if they occur, will inevitably be part of a larger political solution. Large scale return has generally been possible only as part of comprehensive peace agreements and political settlements that resolve prolonged conflicts. For example, some 370,000 Cambodians returned to their country under a voluntary repatriation program that formed an integral component of the 1991 Paris Peace Agreement,⁵⁰ after the signing of a peace agreement in October 1992, almost 1.5 million people began to return to Mozambique;⁵¹ and some one million of those dislocated during the Bosnian conflict have returned to their homes since the signing of the Dayton Peace Agreement in November 1995.⁵²

Politics will determine whether the right to return is implemented or enforced in a particular mass displacement situation. Thus, it will be very difficult for the Serbs and Gypsies to return to the Kosovo province absent support from the international community, which appears at this time unlikely to materialize. This should not, however, be taken as a denial of their right to return. The fact

ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 18 (1994); BRIERLY, *THE LAW OF NATIONS* 61 (6th ed. 1963).

49. Customary law is evidenced by a general practice accepted as law.

50. For a discussion of the Cambodia settlement agreements, *see, e.g.*, Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 *AJIL* 1 (1993).

51. For a discussion of the Mozambique repatriation, *see, e.g.*, PIRKKO KOURULA, *BROADENING THE EDGES: REFUGEE DEFINITION AND INTERNATIONAL PROTECTION REVISITED* 320-22 (1997).

52. *Supra* note 1.

that politics will likely be the determining factor as to whether large scale returns will occur does not mean that international law in general and the right to return in particular should not be applied. The political and, now with Kosovo, military nature of these solutions does not diminish the significance of such returns. It is only through the repeated reaffirmation of this that this important legal principle will continue to develop.

It is unrealistic to expect that "ethnic cleansing" and other campaigns that involve mass expulsion, and which produce massive refugee flows, can be reversed without the political or military participation of the international community. A key component of "ethnic cleansing" campaigns is the desire of the perpetrating group to gain territorial control of a that region. So long as this group maintains control of the particular region, those dislocated likely will be unable to return. The international community was willing to use force against the Serbs in an effort to take control over the "disputed" territory to reverse the "ethnic cleansing" and essentially enforce the right to return the Security Council and others in the international community had so clearly articulated. That willingness should be seen as an indication of the importance the international community places on upholding this right.

Although NATO's military intervention was widely welcomed, it has been severely criticized by international law scholars, their general consensus being that the NATO bombing campaign violated both the United Nations Charter and international law.⁵³ Much of the focus of legal commentators has been on the violations of international law that defined the Kosovo crisis, including the NATO air campaign itself, as a violation of both the United Nations Charter and the laws of war, the bombing of the Chinese Embassy in Belgrade as a violation of the Vienna Convention on Diplomatic and Consular Property, and the gross human rights violations that both precipitated and accompanied the mass expulsions. Little attention, however, has been given to its impact on the right to return to one's homeland generally, and, in particular, the right to do so following mass expulsion. The international community continues to struggle to find a solution to a number of seemingly intractable situations across the world, where millions of dislocated persons remain unable to exercise their right to return. Kosovo, however, may serve as an example of international practice where the right of mass groups to return to their homes has been clearly articulated and universally accepted.

53. See, e.g., Editorial Comments: NATO's Kosovo Intervention, 93 AM. J. INT'L. L. 824 (1999).